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No. 91-216

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

PHILLIP MATTHEWS, ETC.,

Petitioner,

vs.

THE TOWN OF GREENEVILLE, TENNESSEE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS, THE TOWN OF GREENEVILLE, TENNESSEE, NORMAN WILLIAMSON, CHARLES WORLEY, PAUL HITE, JESS MUSICK, AND J. E. BULLEN

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QUESTIONS PRESENTED

1. Did the Courts below correctly hold that decisions made by the Tennessee Valley Authority (hereinafter "TVA") with respect to resale of electric rates and the accounting practices under its contract with the local power distributor were not subject to judicial review in an action brought by one of the distributor's customers who was not a party to the contract?

2. Did the Courts below err in failing to dismiss with prejudice all of petitioner's contract claims against the Town of Greeneville (as owner of the Greeneville Light & Power System), Norman Williamson, Charles Worley, Paul Hite, Jess Musick, and J. E. Bullen (hereinafter collectively "Greeneville")?

3. Did the Courts below correctly hold that the District Court did not have federal questions jurisdiction over Greeneville and the respondent Robert C. Lay under 28 U.S.C. §1331, even though the contract between TVA and Greeneville required Greeneville to keep its books and records in accordance with Federal Energy Regulatory Commission's Uniform System of Accounts as published in the Code of Federal Regulations at 18 C.F.R. §101 (hereinafter "FERC Regulations") and a Tennessee statute applicable to Greeneville's payment of tax equivalents refers to FERC Regulations?

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OPINIONS BELOW

Opinions of the Court of Appeals (Pet. App. xxiv-xliv) in the District Court (Pet. App. iii-xviii) are not reported. The Court of Appeals' decision is noted at 932 F.2d 968.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 2, 1991. The Petition for Writ of Certiorari was filed on July 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

STATEMENT

Greeneville hereby joins TVA and adopts TVA's Statement. Greeneville would note in addition that Greeneville urged the Court of Appeals to exercise it's inherent power to modify the District Court Judgment to provide that Greeneville should be dismissed with prejudice in order to correct the internal inconsistency of the District Court's Final Order which dismissed TVA with prejudice and the remaining defendants without prejudice.

ARGUMENT

I.

The Courts Below Correctly Held That The TVA Actions Which Petitioner Challenges Are Not Subject To Judicial Review.

Greeneville hereby joins TVA and adopts the argument of TVA and the cited authorities that the courts below correctly held that challenged actions are not subject to judicial review and that Petitioner is not an intended third-party beneficiary of the TVA-Greeneville Power Contract (hereinafter the "contract") and thus has

no standing to sue TVA or Greeneville for any of the claims asserted by his Amended and Restated Complaint.

With respect to discovery matters, Greeneville also joins with TVA and adopts its argument and cited authorities that Petitioner is barred from seeking relief by his failure to timely object to the Magistrate's ruling and that, in any event, his claim is without merit.

II.

The Courts Below Erred In Failing To Dismiss With Prejudice Petitioner's Contract Claims Against Greeneville.

The District Court originally dismissed Petitioner's claims against all defendants with prejudice. Upon Petitioner's motion, the District Court amended its judgment to dismiss without prejudice Petitioner's claims against Greeneville by treating the same as pendent state law claims. Greeneville respectfully submits that the District Court's ruling that TVA's actions under the contract cannot be judicially reviewed precludes a state action by the petitioner against Greeneville on the same claims. To permit otherwise, Petitioner would be allowed to do indirectly that which he cannot do directly, *i.e.* judicially review TVA's actions under the contract.

Even assuming for purposes of argument that state law governs the issue of whether Petitioner has a claim against Greeneville as a third-party beneficiary, his contract claims against Greeneville should nevertheless have been dismissed with prejudice since Tennessee law is in accord with federal law on this issue. *Coburn v. City of*

Dyersburg, 774 S.W.2d 610 (Tenn. Ct. of App. 1989, application for permission to appeal denied, Tenn. 1989) at 612, states:

> "A contract entered into by a governmental entity requires a showing that the contract was intended by the parties to confer a direct obligation to identifiable third-party entities. Every contract into which a governmental entity enters is made for the benefit of all its citizens. Only when such a contract manifests a specific intent to grant individual citizens enforceable rights thereunder may a citizen claim such rights as a third-party beneficiary." (citations omitted).

Succinctly put, Tennessee law requires a showing of specific intent to grant individual citizens enforceable rights under a contract with a governmental entity. Absent such a showing an individual citizen " . . . is merely an incidental beneficiary and has no right to assert remedies properly reserved for the parties to the . . . contract." Supra at 612. Without question, Petitioner has failed to make the required showing of a specific intent to grant him enforceable rights under the TVA-Greeneville Power Contract and therefore lacks standing under Tennessee law to pursue any claim thereunder as a third-party beneficiary.

III.

The Courts Below Correctly Held That The District Court Does Not Have Federal Question Jurisdiction Over Greeneville Under 28 U.S.C. §1331 For Any Of Petitioner's State Law Claims Since No Right Or Immunity Created By The Constitution Of Laws Of The United States Is An Essential Element Of Such Claims.

Relevancy Of FERC Regulations.

Assuming that Petitioner has stated a cause of action under state law, his argument that the application, interpretation and construction of FERC regulations provides an independent basis for federal question jurisdiction is fatally flawed. As the record reflects, FERC regulations are relevant to Petitioner's claims on two grounds; first, the contract requires Greeneville to keep its books and records in accordance with FERC regulations, and second, state law refers to the account, "electric plant purchased or sold" as prescribed by FERC regulations in defining "net plant value of the electric plant" under the Tennessee statute which allows payment of tax equivalents by Greeneville. T.C.A. §7-52-303(8)(B)(ii). Petitioner failed to include his tax equivalent claims in his Petition.

No Claim Arising Under Federal Law.

As previously noted, Petitioner is not a third-party beneficiary of the contract thus the contract cannot provide federal question jurisdiction following the dismissal of his contract claims. Likewise, Petitioner has not shown a breach of any duty owed him and arising under federal law.

FERC Regulations Are Not An Essential Element Of Petitioner's Claims.

Even assuming for purposes of argument that Petitioner has standing under state law to require Greeneville to keep its books and records in accordance with FERC regulations, either as a result of the contract or state law pertaining to the payment of tax equivalents, Petitioner has still failed to bring a case under 28 U.S.C. § 1331 since the application of FERC regulations is not an essential element of Petitioner's cause of action.

As stated by Justice Cardozo in *Gulley v. First National Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, ___, 81 L.Ed. 70, 72 (1936);

> "To bring a case within the statute (U.S.C. 28 § 1331), a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." (Citations omitted).

This principle espoused by Justice Cardozo in 1936 is still the law. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (unanimous opinion 1983). "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gulley*, supra, at 299 U.S. 115, 57 S. Ct. ___, 81 L.Ed. 73. To adopt Petitioner's interpretation that federal question jurisdiction may arise pursuant to a contract which states that a party shall keep its books and records in accordance with FERC regulations would be tantamount to allowing parties by contract to confer subject matter jurisdiction by simply providing that the contract would be governed by a particular federal law. Likewise, an

interpretation of 28 U.S.C. § 1331 which creates subject matter jurisdiction in a situation where Greeneville is required by a state statute to exclude an account prescribed by FERC regulations in calculating permissible tax equivalent payments would confer subject matter jurisdiction in the district courts in all state matters where a particular state law refers to a federal statute or federal regulation. These results are obviously not the intent of 28 U.S.C. § 1331. In the words of Justice Holmes,

> "If [state] law authorizes or forbids [something] according to the determination of this court upon a point under the Constitution or acts of Congress, still that point is only material because the [state] law saw fit to make it so. The whole foundation of the duty is [state] law, which, at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force, but upon the law that took it up; . . . the cause of action arises wholly from the law of the state.
>
> But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. . . . [T]he law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by state law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the state law to be also a case under the law of the United States, and so it has been decided by this court again and again. (Citations omitted) *Smith v. Kansas City Title & T. Co.*, 255 U.S. 180, 214, 41

S.Ct. 243, ___, 65 L.Ed. 577, 591 (Dissenting Opinion, 1921)."

The Cases Cited By Petitioner Do Not Support His Claim.

The cases cited by Petitioner do not support his assertion that the application, interpretation and construction of FERC regulations forms an independent basis for federal question jurisdiction.

Christopher v. Cavallo, 662 F.2d 1082 (4th Cir., 1981), was a suit by Christopher that Cavallo had breached a contractual warranty that Cavallo had sufficient title to sell and license a play. Since the play had been found to be an infringement upon a federal copyright, the District Court found that the issue of infringement of a copyright was an essential element of the cause of action for breach of warranty; the question of infringement of federal copyrights is an area of exclusive original jurisdiction of the district courts thus, subject matter jurisdiction existed. The Fourth Circuit Court of Appeals affirmed this ruling.

Kinsey v. Nestor Exploration, Ltd., 604 F.Supp. 1365 (E.D. Washington 1985), involved a removal action of two security suits brought in state court under the Securities Act of 1933, Securities Act of 1934 and Federal RICO statutes. In this case, Kinsey resisted removal on the basis that he was seeking a remedy under state law. The District Court in allowing removal of various issues in the case stated that the gravamen of the underlying transaction not the remedy asserted must be addressed in determining jurisdiction. *Supra* at 1368. In other words, federal

jurisdiction exists if there is alleged a violation of federal law even though a state remedy is sought.

Banco De Ponce v. Hinsdale Supermarket Corp., 663 F.Supp. 813 (E.D. NY 1987), is an interpleader action brought by Banco De Ponce seeking declaration of the rights of Hinsdale Supermarket and a New York state agency of certain food stamps held on account with Banco De Ponce. Banco De Ponce asserted that the interpretation of federal regulations pertaining to food stamps formed the basis for federal question jurisdiction. The court found that no substantial federal question existed which would support the interpleader's action. *Supra* at page 820.

Murphy v. Colonial Federal Savings & Loan Association, 388 F.2d 609 (2nd Cir. 1967), is a case where members of the federal savings and loan association brought suit after management refused to provide them with a list of members. The Second Circuit Court of appeals held that the intent of Congress in enacting 12 U.S.C. § 1464(a) which authorizes the Federal Home Loan Bank Board to prescribe rules and regulations for the organization and operation of federal savings and loan associations "was an intent that the rights of the members of federal savings and loan associations to fair elections be governed by federal law." *Supra*, at 611.

Finally, *Confederated Housing Associates, Inc. v. Department of Housing and Urban Development*, 538 F.Supp. 1158 (E.D. Ark. 1982), was a suit against a federal agency involving not a question of state law but a question of whether validly enacted administrative regulations by the federal agency could be treated as laws of the United

States under 28 U.S.C. § 1331(a). The District Court held that validly issued administrative regulations may be treated as laws of the United States under 28 U.S.C. § 1331(a). *Supra,* at 1162. This case does not address the primary issue of whether a case similar to Petitioner involves as an essential element a right or immunity created by the Constitution or the laws of the United States.

In summary, Petitioner has failed to assert a claim that a right or immunity created by the Constitution or laws of the United States is an essential element of his cause of action. His pleadings likewise fail to fall under the "well-plead complaint rule" which allows a state law cause of action to be brought in federal court where there appears that some substantial, disputed question of federal law is a necessary element of a well-plead state claim. See generally *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, supra.*

No State Law Claim For Tax Equivalents.

Finally, although Petitioner has alleged in his Complaint that Greeneville failed to comply with FERC regulations resulting in an understatement of Greeneville's physical assets, which allegedly reduced the amount of payments in lieu of taxes (tax equivalents) that were paid by Greeneville to the Town of Greeneville and Greene County pursuant to T.C.A. § 7-52-301, et seq., the record will reflect that Petitioner has at no time requested any relief with respect to the payment of tax equivalents,

except the request for the issuance of a mandamus requiring the Town of Greeneville to keep its books and records in accordance with FERC regulations, nor has Petitioner presented any argument that he has a claim under state law pertaining to the payment of tax equivalents. Indeed, he can present no valid argument in light of the fact that the payment of tax equivalents are discretionary and not mandatory, T.C.A. § 7-52-304, and any dispute concerning the amount of tax equivalents paid during the time period addressed by Petitioner's complaint are all time barred pursuant to T.C.A. § 7-52-304(4).

CONCLUSION

In accordance with the foregoing argument and upon the authorities cited therein, it is clear that the only error committed by the Courts below was the failure of the District Court to dismiss *with prejudice* Petitioner's contract claims against Greeneville and thus the Petition for a Writ of Certiorari should be *denied*.

RELIEF

Should the Petition for a Writ of Certiorari be granted, Greeneville will request that the District Court's judgment be *modified* to provide that the contract claims of Petitioner against Greeneville be *dismissed with prejudice.*

Respectfully submitted,

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